

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERNELL E. WEBB,

Defendant-Appellant.

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UNPUBLISHED

April 4, 2000

No. 207357

Oakland Circuit Court

LC No. 97-153147-FH

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

The jury convicted defendant of knowing retention of a financial device, 750.157n; MSA 28.354(14), possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and misdemeanor possession of marijuana, 333.7403(2)(d); MSA 14.15(7403)(2)(d). The court sentenced defendant to concurrent prison terms of 2-1/2 to 8 years for the financial device conviction, 2-1/2 to 8 years for the possession of cocaine conviction, and one year for the possession of marijuana conviction. He appeals as of right, and we affirm.

As defendant was entering a bus, the driver recognized him as the person who had assaulted her a week earlier. She called her dispatcher and requested defendant's ejection from the bus. A police officer arrived and, after receiving the bus driver's report, removed defendant from the bus. Fearing for his safety, the police officer conducted a pat down search of defendant. In defendant's wallet, the police officer found defendant's driver's license and a credit card bearing the name of another person. The officer arrested defendant. The credit card's owner testified that the card had disappeared from his wallet a few days earlier. After defendant was booked and taken into custody, the police conducted a routine inventory search of his wallet and found small amounts of cocaine and marijuana that had been stored among papers in the wallet.

Defendant argues that he received ineffective legal representation at trial because his attorney did not move to suppress the evidence found in his wallet on the basis that the police did not have probable cause to either arrest or search him or that the search of his wallet exceeded the scope of a legitimate pat-down for weapons. To establish his claim of ineffective assistance of counsel, defendant bears the burden of showing that his counsel's performance was deficient and that the deficient

performance prejudiced his defense. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Because resolution of this issue depends largely on facts outside the lower court record, it was incumbent on defendant to make a testimonial record at the trial court level to support his claim and exclude hypotheses consistent with the view that his trial lawyer represented him adequately. *Hoag, supra* at 6. Because the lower court record does not support defendant's contention that he received ineffective assistance of counsel, and because defendant did not move for a new trial or evidentiary hearing with respect to this issue in the trial court, appellate review is foreclosed. *Id.*; *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant also contends that the prosecutor improperly used evidence of his prior conviction for uttering and publishing to establish his bad character and his propensity for committing crime. However, defendant failed to raise this argument at trial as a basis for excluding the evidence of his prior uttering and publishing conviction. Thus, it is not preserved for review. MRE 103(a)(1), *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).

We review unpreserved evidentiary issues for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). There is nothing in the record to show that the prosecutor's attempt to question defendant about his uttering and publishing conviction resulted in manifest injustice. Defendant chose to testify at trial, thus placing his credibility as a witness at issue. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). The felony offense of uttering and publishing, as a crime containing an element of dishonesty, *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998), was directly probative of defendant's truthfulness as a witness and, therefore, evidence of this conviction was admissible pursuant to MRE 609. *People v Allen*, 429 Mich 558, 593-594; 420 NW2d 499 (1988).

Further, defendant repeatedly insisted that he had the character of a "Good Samaritan"<sup>1</sup> in attempting to explain why he possessed a credit card belonging to someone else who had not given him permission to retain the card. Defendant claimed that he found the card and, in accordance with his good character, kept it in order to return it to its rightful owner. Under MRE 405(b), the prosecutor was thus permitted to attempt to rebut defendant's claim to impeccable character by introducing this specific instance of his dishonest conduct. See MRE 404(a)(1), *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998); *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997). There is no manifest injustice here.

Lastly, defendant says that he received the ineffective assistance of counsel at sentencing on various bases and, therefore, is entitled to resentencing. However, the record indicates that defendant has fully served his minimum sentence of 2-1/2 years. As such, it is impossible for this Court to fashion a remedy and, accordingly, we decline to review this issue as moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ Janet T. Neff  
/s/ David H. Sawyer  
/s/ Henry William Saad

<sup>1</sup> See *Luke*, 10:30-37.